Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

No. 99-43

IN THE

Supreme Court of the United States

ROGER TIMOTHY BAST, Individually and as Personal Representative of the Estate of Rhonda Rae Fleming Bast; and DOUGLAS GLENN BAST, a Minor Child,

Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JERRY W. SPOONEMORE
Counsel of Record
MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN, P.L.L.C.
Attorneys for Respondent
5800 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(202) 682-7090

154242

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2488

QUESTION PRESENTED FOR REVIEW

Under what circumstances, if at all, may a court make a monetary award, as a form of "appropriate equitable relief" under ERISA § 502(a)(3), against a claim fiduciary and in favor of an ERISA welfare benefit plan participant whose claim was initially denied but later approved after review, and who has not sought relief under ERISA § 502(a)(1)(B)?

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Prudential Insurance Company of America, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In addition to containing improper argument, Petitioners' Statement of the Case contains numerous factual misstatements.

A. Petitioners Included Numerous "Facts" in their Statement of the Case Which Were Not Established in the District Court Proceeding Below, and Which Are Thus Not in the Record.

1. "*Two years earlier Prudential had reached a written agreement with Fred Hutchinson* [Cancer Research Center] *governing the fees that would be charged for this specific procedure and acknowledging that it was no longer experimental in nature.*" (Petition, p. 3). There is no evidence of any sort in the record on this case to support this assertion of fact in petitioners' Statement of the Case. Moreover, the statement is not true. *See* the discussion at B.1. below.

2. "*All parties, including Prudential, were aware that this procedure had to be performed quickly as the cancer was aggressive.*" (Petition, p. 3). This assertion of fact is totally unsupported in the record.

3. "The company insisted, *despite its prior agreement with Fred Hutchinson*, that the ABMT procedure was 'experimental' and hence not covered by the Bast's benefit plan." (Petition, p. 3). There is nothing in the record to support petitioners' assertion of such a "prior agreement with Fred Hutchinson." *See* the discussion at B.1. below.

4. "*However, they* [Basts] *did not have sufficient funds — approximately $200,000 — to pay for the ABMT procedure*

itself." (Petition, p. 3). There is nothing in the record to support either the assertion regarding the Basts' financial circumstances or the cost, approximate or not, of the ABMT with HDC procedure. Indeed, there was no evidence of any sort before the District Court regarding the projected cost of the proposed procedure, much less to the effect that it was "approximately $200,000."

5. "Ms. Bast retained counsel, *who brought to Prudential's attention its own 1989 agreement with Fred Hutchinson and contended that it required coverage for the ABMT Ms. Bast needed.*" (Petition, p. 3). The record below established that Ms. Bast did retain counsel, who wrote letters to Prudential dated February 13, February 14 and March 6, 1992. However, none of the three letters "brought to Prudential's attention its own 1989 agreement with Fred Hutchinson and contended that it required coverage for the ABMT Ms. Bast needed." Indeed, none of the letters referred to any such agreement because no such agreement ever existed.[1] There is no support anywhere in the record, or in fact, for this assertion.

6. "*Finally, on February 28, 1992, a full five months after Ms. Bast first sought preauthorization, Prudential acknowledged that the ABMT procedure was covered and agreed to fund it.*" (Petition, p. 3). This statement is misleading in that it implies that the original denial of the

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1. The letter of February 13 listed a number of insurers (*not* including Prudential) which the lawyer contended had paid for ABMT with HDC treatment at Fred Hutchinson in 1991 and 1992. That letter also asserted the lawyer's belief that Prudential had agreed with Duke University in 1988 to cover ABMT with HDC treatment for breast cancer at Duke University Medical Center, but provided no support for that belief.

claim was erroneous. On the contrary, the denial was correct and in accordance with the provisions of the Plan when the claim determination was made. It was only after Prudential's company-wide claim procedures were amended on February 7, 1992 to allow coverage under certain circumstances even though the treatment was still investigational and experimental, and after the attorney for Ms. Bast provided Prudential with a copy of the study protocol in February, 1992, that the proposed treatment became qualified for coverage. (*See* Petition, 9a).

7. "*The court* [Ninth Circuit Court of Appeals] *acknowledged that respondent's alleged violations had indeed resulted in unjust enrichment of considerable magnitude (equal to the cost of the procedure).* . . ." (Petition, p. 4). Contrary to the assertion by petitioners, the Ninth Circuit Court did not "acknowledge" that Prudential had been unjustly enriched by initial denial of the claim. The reference to this claim in the Court's opinion, dealing with Amicus' constructive trust theory, is stated as a hypothetical:

> While Prudential *may have been* unjustly enriched, it did not take money from the Plan.

(Petition, 20a) (Emphasis added). Furthermore, the Court was aware that Prudential was only the claims administrator and not an insurer concerning this claim, because the nationwide stop-loss aggregate benefits amount had not been reached. (Petition, 8a). Accordingly, any monetary saving resulting from denial of the claim would inure only to the benefit of the Plan and the employer, Cole, and not to Prudential.

B. Petitioners Included "Facts" in their Statement of the Case and Elsewhere in their Petition Which Are Not True.

1. "*Two years earlier Prudential had reached a written agreement with Fred Hutchinson* [Cancer Research Center] *governing the fees that would be charged for this specific procedure and acknowledging that it was no longer experimental in nature.*" (Petition, p. 3). Not only is this assertion not supported in the record (*see* the discussion at A.1. above), it is simply not true.[2]

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2. Subsequent to the District Court's granting of summary judgment of dismissal of petitioners' complaint, and while petitioners' appeal to the Ninth Circuit was pending, petitioners sought to supplement the record on appeal by the addition of a document which had not been before the District Court and which was not a part of the record before that court. In fact, by misrepresenting the document to the Ninth Circuit the petitioners initially were successful in obtaining the entry of an order, filed on November 21, 1997, adding that document to the record on appeal. The order included the following language: "***Based on appellants' representation that the copy of a letter dated July 20, 1989 should have been part of the excerpts, the contents of which are limited to documents filed in the case below***, the motion is granted." (Emphasis added). The court later struck the document from the record on respondent's motion by an order filed on December 9, 1997 after respondent brought to the court's attention the fact that notwithstanding petitioners' representations to the contrary, the document in fact was not part of the record before the District Court.

The document which petitioners sought, improperly, to add to the record on appeal was a letter agreement among Fred Hutchinson, Swedish Hospital Medical Center, and Prudential regarding an allogenic bone marrow transplant network for treatment of certain, specified types of diseases, both malignant and non-malignant. Those diseases covered under the agreement did ***not*** include breast cancer.

2. "*It is undisputed that the delay saved some $200,000, the cost of the treatment which Ms. Bast was too ill to receive by the spring of 1992.*" (Petition, p. 10). This assertion is simply not true. There was no evidence at all before the District Court regarding the projected cost of the ABMT with HDC procedure, whether it was $200,000 or some other amount. Furthermore, the record before the District Court established that the Plan paid for the harvest and storage of the bone marrow in March, 1992, and continued to pay for Ms. Bast's conventional cancer treatment and care for a number of months prior to her death. The record does not reflect the total of such costs and expenses which were paid by the Plan, but it was undoubtedly substantial, and may even have approached or exceeded the projected cost of the ABMT with HDC procedure.

C. Petitioners Omitted Facts Material to Consideration of the Questions Presented from their Statement of the Case.

1. The ERISA major medical benefit plan ("Plan") sponsored by the employer, Cole National Corporation ("Cole"), provided that all benefits up to a specified annual amount would be paid by Cole from its general assets. (Petition, App. 8a).

2. At all pertinent time periods, The Prudential Insurance Company of America ("Prudential") was the administrator of the Plan, and was also the excess insurer providing insurance coverage to Cole to cover benefits payments in excess of a specified annual amount. (Petition, App. 8a).

3. Because the specified annual aggregate amount of major medical benefits nation-wide ("stop-loss") to be paid

by Cole out of its own assets was not exceeded during any pertinent time period, all benefits, including those for Rhonda Bast, were paid by Cole, and Prudential paid no major medical benefits under the Plan for any claimant, including Rhonda Bast. (Petition, App. 8a; Braun Decl., ¶ 4 (E.R., p. 85)).

4. When Prudential as claims administrator of the Plan denied the request for pre-authorization of the bone marrow procedure in September, 1991, Rhonda Bast neither appealed that denial nor sought an injunction to compel Prudential to authorize coverage for the procedure under ERISA § 502(a)(1)(B). (Petition, App. 18a, n.1). The first submittal of additional information to Prudential in support of the claim was by letter from an attorney dated February 13, 1992 and received by Prudential on February 18, 1992, and included the protocol consent form. (Petition, App. 9a; Habenicht Aff., ¶ 9 (Suppl. E.R., p. 4)).

5. On February 28, 1992, within ten days after receiving the submittal of additional information regarding the claim, Prudential approved the claim based on a medical director's conclusion that "while the protocol is clearly investigational, since it is a NCI [National Cancer Institute] sponsored trial, and according to the rules established in a recent GCLM [Group Claim Division Memorandum], it is eligible for benefits." (Petition, App. 9a). The referenced GCLM was a company-wide claim memorandum of general applicability issued on February 7, 1992. (Habenicht Aff., ¶ 10 (Suppl. E.R., p. 4)).

6. In early March, 1992, the Plan paid the charges for the bone marrow procedure incurred in September, 1991, and thereafter paid all eligible charges for Rhonda Bast's

medical care and treatment through the date of her death in January, 1993. (Petition, App. 9a; Habenicht Aff., ¶ 12 (Suppl. E.R., p. 4)).

REASONS FOR DENYING THE WRIT

I.

A REMEDY FOR DENIAL OF THE CLAIM WAS AVAILABLE UNDER ERISA § 502(A)(1)(B); THEREFORE, EQUITABLE RELIEF UNDER ERISA § 502(A)(3) IS NOT "APPROPRIATE."

The entire argument of petitioners in support of their petition for a writ of certiorari is premised on the assumption that if the initial denial of the claim were wrongful, there would be no remedy for such wrongful denial unless some sort of "appropriate equitable relief" were created by the court under ERISA § 502(a)(3). This assumption is fallacious.

When her claim was initially denied, Rhonda Bast had available to her all the remedies expressly provided in ERISA § 502(a)(1)(B). Specifically, she could have commenced a civil action to recover benefits that she claimed were due her under the terms of the Plan, to enforce her rights under the terms of the Plan, or to clarify her rights to future benefits under the terms of the Plan.[3] In such a circumstance, this Court has stated that a plan participant or beneficiary whose

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3. ERISA § 502(a)(1)(B) provides that a participant or beneficiary may bring a civil action "(B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

claim has been rejected "would have a panoply of remedial devices at her disposal," including those specifically afforded by ERISA § 502(a)(1)(B). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985):

> If . . . the plan administrator had adhered to his initial determination that respondent was not entitled to disability benefits under the plan, respondent would have had a panoply of remedial devices at her disposal. To recover the benefits due her, she could have filed an action pursuant to 502(a)(1)(B) to recover accrued benefits, to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future.

Following denial of her claim, Rhonda Bast did not avail herself of any of the "panoply of remedial devices at her disposal."

Petitioners asserted a number of legal theories in the District Court below, seeking a monetary judgment against Prudential for an alleged wrongful denial of health care benefits under an ERISA employee welfare benefit plan. In their petition to this Court, they claim the existence of a state of confusion and conflict among the several circuit courts regarding whether and under what circumstances equitable relief under ERISA § 502(a)(3) is available to an aggrieved plan participant or plan fiduciary, and cite a number of cases to support their assertion. However, none of the cases cited by petitioners involved a claim for "appropriate equitable relief" under ERISA § 502(a)(3) for an alleged wrongful denial of a claim for health care benefits under an employee welfare benefit plan.

Many of the cases cited by petitioners involved pension plans rather than welfare benefit plans. Several of these cases involved a claim by a plan participant arising out of alleged wrongful conduct of a fiduciary or employer: *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995), *cert. denied*, 516 U.S. 819 (1995) (retaliatory firing by employer); *Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997) (improper transfer of participant's pension plan funds from trustee bank to absconding employer); *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998) (employer/fiduciary failed to explain to participants adverse tax consequences of early retirement program); *Bair v. General Motors Corp.*, 895 F.2d 1094 (6th Cir. 1990) (executive employee denied participation in retirement program affording "special early retirement benefits"); *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994) (class action to recover portion of distribution of surplus assets in pension fund); *Kwatcher v. Mass. Service Emp. Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (sole shareholder of employer sought return of overpayment of contributions to pension plan which plan administrator refused to refund). Other cases cited by petitioners involving pension plans concerned actions by the plan or fiduciary to recover funds allegedly wrongfully or erroneously paid: *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176 (3rd Cir. 1991) (action against third party who wrongfully received death benefits); *Jamail, Inc. v. Carpenters Dist. Council*, 954 F.2d 299 (5th Cir. 1992) (claim by employer for overpayment of contributions to multi-employer trust fund); *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998) (claim by trustees of pension fund against third party non-fiduciaries who participated in defrauding the fund).

Most of the cases cited by petitioners concerning welfare benefit plans involved actions by plan fiduciaries to recover

on subrogation or subrogation-like contractual reimbursement claims arising out of allegedly wrongful or erroneous payments: *Member Services Life Ins. Co. v. American Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950 (10th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1843 (1998); *Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990); *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998); *Pacificare Inc. v. Martin*, 34 F.3d 834 (9th Cir. 1994); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990), *cert. denied*, 498 U.S. 982 (1990); *Health Cost Controls v. Skinner*, 44 F.3d 535 (7th Cir. 1995); *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487 (D.C. Cir. 1998); *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18 (2nd Cir. 1996). The only cases cited by petitioners involving welfare benefit plans in which plan participants or beneficiaries were plaintiffs arose out of misrepresentations made by former employers or fiduciaries concerning plan coverage: *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3rd Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996) (class action by former employees/participants to reinstate benefits which had been promised to them "for life"); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3rd Cir. 1994) (action by beneficiary of life and accidental death and dismemberment insurance to recover on supplemental coverage based on misrepresentations contained in summary plan description).

None of the cases cited by petitioners involved a claim by a plan participant arising out of denial of a claim under a welfare benefit plan.

The absence in the petition of citations of reported cases involving claims such as petitioners' under ERISA

§ 502(a)(3) is not surprising; a remedy for such claims is expressly provided elsewhere in ERISA under § 502(a)(1)(B). Because a remedy for a claim of wrongful denial of health care benefits is thus elsewhere provided, equitable relief for such a claim is not "appropriate." As this Court stated in *Varity v. Howe*, 516 U.S. 489, 515 (1996):

> . . . [T]he statute [ERISA § 502(a)(3)] authorizes "*appropriate*" equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." *Pilot Life Ins. Co.*, 481 U.S., at 54. See also *Russell*, 473 U.S., at 147; *Mertens*, 508 U.S., at 263-264. Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

(Emphasis in original). As this Court further expressly recognized in *Varity*, 516 U.S. at 512, Congress did indeed elsewhere provide adequate relief for an alleged wrongful denial of a claim for health care benefits:

> [A]s the Court pointed out in *Russell*, 473 U.S., at 144, ERISA specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims, . . . and one that runs directly to the injured beneficiary. § 502(a)(1)(B).

Referring to the fact pattern in *Varity* and the effect of § 502(a)(3), this Court stated:

> Why should we not conclude that Congress provided yet *other remedies* for yet *other breaches* of *other sorts of fiduciary obligation* in another, "catchall" remedial section?

[Emphasis added]. *Id.*, 516 U.S. at 512. This reference was clearly to ERISA § 502(a)(3) and to claims *other* than those for wrongful denial of benefits.

> Such a reading is consistent with § 502's overall structure. *Four of that section's six subsections focus upon specific areas, i.e. the first (wrongful denial of benefits and information)*, the second (fiduciary obligations related to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties). *The language of the other two subsections, the third and the fifth, creates two "catchalls,"* providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that *these "catchall" provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.*

[Emphasis added]. *Id.*, 516 U.S. at 512.

This Court in *Varity* indicated that because ERISA § 502(a)(1)(B) specifically provides a remedy for wrongful denial of a claim, an equitable remedy under § 502(a)(3) for such a claim would not be "appropriate":

> . . . [W]e should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Id., 516 U.S. at 515.

Rhonda Bast had a remedy under § 502(a)(1)(B) if her claim had been denied in violation of the provisions of either ERISA or the Plan. She did not avail herself of this express remedy.

Petitioners filed this action for damages in District Court, and at oral argument expressly disavowed restitution as a remedy. (Suppl. E.R., p. 37). They now assert that if the initial denial of the claim were wrongful, the only remedy for such wrongful denial would be restitution or some similar form of equitable relief under § 502(a)(3). This assertion is analogous to claiming that one who has allowed the statute of limitation to run on a claim is without a remedy, and therefore should be afforded equitable relief to obtain a monetary recovery.

II.

THERE ARE NO CONFLICTS; THE CIRCUIT COURTS OF APPEAL ARE IN ACCORD THAT RELIEF UNDER ERISA § 502(a)(3) IS NOT AVAILABLE.

Contrary to petitioners' claim of confusion and conflict between and among lower courts, which they assert as justification for this Court's granting their petition for

certiorari, all Circuit Courts which have considered the legal issue presented in this petition are in agreement: because of the remedies available to aggrieved welfare benefit plan participants and beneficiaries under ERISA § 502(a)(1)(B), there is no "appropriate equitable relief" available to them under ERISA § 502(a)(3). *Wald v. Northwestern Bell Corp.*, 83 F.3d 1002, 1006 (8th Cir. 1996) ("Because [plaintiff] is provided adequate relief by her right to bring a claim for benefits under section 502(a)(1)(B), . . . equitable relief would not be appropriate in her case. Thus, she does not have a cause of action under section 502(a)(3)"); *Conley v. Pitney Bowes*, 176 F.3d 1044, 1047 (8th Cir. 1999) ("We have held that where a plaintiff is 'provided adequate relief by [the] right to bring a claim for benefits under . . . § 1132(a)(1)(B),' the plaintiff does not have a cause of action to seek the same remedy under § 1132(a)(3)(B)," citing *Wald*); *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1193 (8th Cir. 1998) ("[Plaintiff's] claim pursuant to § 502(a)(3) was barred . . . because [plaintiff] was provided adequate relief through his right to sue [defendant] under § 502(a)(1)(B)," quoting District Court opinion); *Turner v. Fallon Community Health Plan*, 127 F.3d 196, 200 (1st Cir. 1997) ("Beneficiaries may sue a plan for breach of fiduciary duty causing individual harm, but *such suits are allowed* only for equitable relief and, even then, *only where Congress has failed to provide more specific relief . . . Neither condition is met here since* [plaintiff] seeks damages, not equitable relief, and *his grievance — a denial of benefits — is specifically addressed by 29 U.S.C. § 1132(a)(1)(B)* [ERISA § 502(a)(1)(B)]" [Emphasis added].); *Wilkins v. Baptist Healthcare System*, 150 F.3d 609, 615-16 (6th Cir. 1998) ("Because § 1132(a)(1)(B) [ERISA § 502(a)(1)(B)] provides a remedy for [plaintiff's] alleged injury that allows him to bring a lawsuit to challenge the Plan administrator's denial of benefits to which he

believes he is entitled, he does not have a right to a cause of action for breach of duty pursuant to § 1132(a)(3) [ERISA § 502(a)(3)]." "To rule in [plaintiff's] favor would allow him and other ERISA claimants to simply characterize a denial of benefits as a breach of fiduciary duty, a result which the Supreme Court expressly rejected. *Varity,* 116 S. Ct. at 1079."); *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1335 (5th Cir. 1992) ("Section 502(a)(3) provides for relief apart from an award of benefits due under the terms of a plan. When a beneficiary simply wants what was supposed to have been distributed under the plan, the appropriate remedy is § 502(a)(1)(B)"). *See also Coyne & Delaney Co. v. Blue Cross & Blue Shield*, 102 F.3d 712, 715 (4th Cir. 1996) (quoting the above passage from *Corcoran* with favor).

CONCLUSION

Petitioners have established no basis under Rule 10 which would warrant granting the petition for a writ of certiorari. Notwithstanding petitioners' attempt to portray conflict and confusion among the United States courts of appeal on legal issues pertinent to this case, no such conflict exists. This case involved a denial (although later approved) of a participant's claim for benefits under an employee welfare benefit plan. This court has made it clear that Congress provided a "panoply" of remedies for wrongful denial of such claims, including those contained in ERISA § 502(a)(1)(B). *Varity*, 516 U.S. at 512, 515. This court has further made it clear that the "appropriate equitable relief" provided for in ERISA § 502(a)(3) is a "catchall" available to address only those claims for which a remedy is not provided elsewhere in ERISA § 502. *Id.*, 516 U.S. at 512, 515.

Rather than being in conflict, all United States courts of appeal which have dealt with the issue of the availability of "appropriate equitable relief" under ERISA § 502(a)(3) to a participant or beneficiary whose welfare benefit plan claim has been allegedly wrongfully denied are in accord. As this court made clear in *Varity*, no remedy is provided to such person under ERISA § 502(a)(3) because Congress provided an adequate remedy in ERISA § 502(a)(1)(B). For this reason alone the petition for writ of certiorari should be denied.

In addition to the foregoing, however, there are other reasons to deny the petition. Petitioners assert that Prudential was unjustly enriched as a result of the (initial) denial of Rhonda Bast's claim, and that an equitable remedy of restitution, or something similar, should be available to them under ERISA § 502(a)(3). In so claiming, however, petitioners overlook critical facts which would defeat such a claim even if it were otherwise available to them. The record in this case is clear that Prudential's role was solely that of a claims administrator, not an insurer. All plan claims nationwide during all pertinent time periods here were paid by the employer, Cole, because the stop-loss figure for excess insurance coverage was never reached or exceeded. Thus, petitioners' assertion that Prudential was unjustly enriched as a result of the claim denial is not only incorrect, it is also totally unsupported by the record. Furthermore, there is nothing in the record establishing what the projected cost of the proposed HDC with ABMT was, nor how much in medical expenses Cole actually paid for the conventional chemotherapy and radiation therapy Rhonda Bast actually received in lieu of the experimental and investigational HDC with ABMT treatment. Thus, there is no basis for claiming that any "savings" were realized at all, whether to Cole, to the plan, or to any other entity, including Prudential. The

record is thus devoid of any basis whatsoever to support the granting of equitable relief under ERISA § 502(a)(3) to petitioners, even if such relief were otherwise available to them.

Petitioners' petition for writ of certiorari in this case should be denied.

Respectfully submitted,

JERRY W. SPOONEMORE
Counsel of Record
MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN, P.L.L.C.
Attorneys for Respondent
5800 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(202) 682-7090